



**Before the  
State of Wisconsin  
DIVISION OF HEARINGS AND APPEALS**

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In the Matter of the 1968 Chevrolet Camaro, VIN  
124378N423509, Purchased by Frankie J. Warner.

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Case No.: 97-H-1022

FINAL DECISION

Frankie J. Warner applied to the Department of Transportation for a title and registration for a 1968 Chevrolet Camaro. By letter dated February 4, 1997, the Department refused to issue a title or registration to him. By letter dated February 24, 1997, Mr. Warner requested a hearing to review the Department's decision.

Pursuant to due notice a hearing was held on May 12, 1997, in Madison, Wisconsin, before Mark J. Kaiser, Administrative Law Judge. After the hearing, the parties filed written argument. The last brief was received on May 16, 1997.

In accordance with secs. 227.47 and 227.53(1)(c), Stats, the parties to this proceeding are certified as follows:

Frankie J. Warner, by  
Attorney David J. Ross  
PO Box 16  
Evansville, WI 53536-0016

Jamès Lien, by  
Attorney Ann Ustad Smith  
Michael, Best & Friedrich  
PO Box 1806  
Madison, WI 53701-1806

Wisconsin Department of Transportation, by  
Attorney Charles M. Kernats  
Office of General Counsel  
PO Box 7910  
Madison, WI 53707-7910

The Administrative Law Judge issued a proposed decision on June 6, 1997. No objections to the proposed decision were received. The proposed decision is adopted as the final decision in this matter.

#### Findings of Fact

The Administrator finds:

At the hearing the parties filed a stipulation containing the following facts:

1. During the first half of June, 1996, Frankie J. Warner, hereinafter called "Warner," located a 1968 Z-28 Chevrolet Camaro in the Wisconsin State Journal. Mr. Warner called the number listed and made arrangements to see the vehicle that evening. He was informed that the vehicle was owned by James Lien, hereinafter called "Lien." That evening he went to the Lien residence and looked at the vehicle. He spoke with Mr. Lien's fiancée. He was able to speak to Mr. Lien by telephone and asked if Mr. Lien would be interested in taking a 1986 Chevrolet Corvette as a partial trade. Mr. Lien advised he was not interested in taking a trade on the Camaro, but that if he couldn't sell the car, Dave Larson would sell it for him.
2. Shortly afterward, Mr. Lien delivered his 1968 Chevrolet Camaro Z-28, VIN 124378N423509 to Capitol Corvette. Mr. Lien then entered into a consignment agreement with David Larson.
3. About a week later, Mr. Lien's fiancée called Mr. Warner and told him that the Camaro was now at Capitol Corvette in Madison. Capitol Corvette was the business name of a used motor vehicle dealership owned and operated by David Larson at 5400 King James Way, Madison, Wisconsin. Mr. Lien's fiancée had left a message on Mr. Warner's answering machine indicating that David Larson had said he might take a Corvette trade-in on the Camaro and that if he was still interested in the vehicle, he should contact David Larson.
4. About a week later, Mr. Warner called Mr. Larson and asked if he would consider taking his 1986 Chevrolet Corvette as a trade-in on the Camaro. Mr. Larson told Mr. Warner to bring his vehicle down so he could inspect it.
5. On June 26, 1996, Mr. Warner called Mr. Larson and made arrangements to bring his Corvette into Capitol Corvette on June 27, 1996, for the inspection. On the morning of June 27, 1996, Mr. Warner brought his Corvette to Capitol Corvette for the inspection. Following the inspection, Mr. Larson told Mr. Warner that he would take the Corvette as a trade on the Camaro and after some negotiation, they agreed that Mr. Warner would pay an additional cash payment of \$1,500 plus tax. Mr. Warner then signed the title to his 1986 Chevrolet Corvette, VIN 1G1YY0782G5122288 over to David Larson. Mr. Warner also gave Mr. Larson his check for \$1,642.50, a copy of which is attached hereto as Exhibit "3" and incorporated herein by reference, for the balance of the purchase price, sales tax, and related fees. Mr. Larson then completed the MV-11 Application For Title, signed it, had Mr. Warner sign it, and gave him a copy. Mr. Larson then completed a separate form for personalized license plates, but did not give Mr. Warner a copy of that document. Mr. Larson then told

- Mr. Warner that he would take care of sending all of the paper work in and that Mr. Warner should receive the new title in six to eight weeks and that the plates might take a little longer.
6. Mr. Larson then gave Mr. Warner possession of the Camaro and took possession of the Corvette. Mr. Warner's check to Capitol Corvette dated June 27, 1996, had the number written as \$1,642.50 but had the number written as "six hundred and forty two and 50/100." When the check was actually cashed by Mr. Warner's bank, it was cashed for \$642.50. By the time Mr. Warner realized this discrepancy, Capitol Corvette had been closed and no demand was ever made on him for the additional thousand dollars. Mr. Warner is ready, willing, and able to pay the additional thousand dollars upon transfer of the title to the Camaro to his name.
  7. Mr. Lien never received the trade-in, money or any other consideration for the sale of his vehicle.
  8. At this time, the Division of Motor Vehicles of the Wisconsin Department of Transportation has refused to issue a new title to Mr. Warner for the Camaro. Mr. Warner was notified of the Division's decision by letter of February 4, 1997. Mr. Warner then appealed the decision of the Wisconsin Department of Transportation to the Division of Hearings and Appeals by filing this Request for Hearing on February 25, 1997 with the Division of Hearings and Appeals.
  9. If David Larson was subpoenaed to testify at this hearing, he would plead the Fifth Amendment and not answer any questions regarding this transaction.

### Discussion

Frankie J. Warner applied to the DMV for a certificate of title and registration for the subject motor vehicle. Pursuant to secs. 342.11(1) AND 342.12(2), Stats., the DMV refused to issue a title or registration to Mr. Warner for the subject motor vehicle.<sup>1</sup> The Wisconsin motor

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<sup>1</sup> Sec 342 11(1), Stats , provides in relevant part

The department shall refuse issuance of a certificate of title...for any of the following reasons:

- (1) The department has reasonable grounds to believe that.
  - (a) The person alleged to be the owner of the vehicle is not the owner
  - (b) The application contains a false or fraudulent statement.

Sec. 342 12(2), Stats., provides in relevant part.

- (2) If the department is not satisfied as to the ownership of the vehicle or that there are no undisclosed security interests in it, the department, subject to sub. (3), shall either:

vehicle code is silent with respect to issuance of a title and registration in this situation. The transaction is regulated by the Uniform Commercial code. Pursuant to the sec. 402.403(2), Stats., "[a]ny entrusting of possession of goods to a merchant who deals in goods of that kind gives the merchant power to transfer all rights of the entruster to a buyer in ordinary course of business."

In the instant matter, James Lien entered into a consignment agreement with Capitol Corvette for the purpose of selling the subject vehicle. However, Mr. Lien argues that the consignment agreement is void because it does not comply with the requirements of sec. TRANS 138.04(b), Wis. Adm. Code, and that even if the consignment agreement is valid, the sale to Frankie Warner did not comply with the requirements of the consignment agreement. The validity or terms of the consignment agreement are not material to the issue before the Division of Hearings and Appeals. Pursuant to the sec. 402.403(2), Stats., the entrusting of the vehicle gave Capitol Corvette authority to transfer all James Lien's ownership interests to Frankie Warner.

The Wisconsin Supreme Court has stated that "... the purpose of sec. 402.403(2) and (3) is to protect a person from third-party interest in goods purchased from the general inventory of a merchant regardless of that merchant's actual authority to sell those goods." Mattek v. Malofsky, 42 Wis.2d 16, at 19, 165 N.W.2d 406 (1969). The validity, or even the existence, of a consignment agreement is not a factor. James Lien entrusted the subject motor vehicle to Capitol Corvette for the purpose of selling the vehicle. Accordingly, Capitol Corvette had the power to transfer ownership of the vehicle to a buyer.

Capitol Corvette has authority to transfer interest in the vehicle even if the consignor has retained title. In general, the interests of a consignor are not protected unless the consignor complies with one of the three alternatives set forth at sec. 402.326(3), Stats., relating to informing prospective creditors of the consignee of a potential security interest.<sup>2</sup> James Lien does not allege that he complied with the provisions of sec. 402.326(3), Stats.

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(a) Withhold issuance of a certificate of title until the applicant presents documents reasonable sufficient to satisfy the department as to the applicant's ownership of the vehicle and that there are no undisclosed security interests in it; or

(b) Issue a distinctive certificate of title pursuant to sec. 342.10(4) or 342.283.

<sup>2</sup> Sec. 402.326(3), Stats., provides in relevant part:

(3) Where goods are delivered to a person for sale and such person maintains a place of business at which the person deals in goods of the kind involved, under a name other than the name of the person making delivery, then with respect to claims of creditors of the person conducting the business the goods are deemed to be on sale or return. This subsection is applicable even though an agreement purports to reserve title to the person making delivery until payment or resale or uses such words as "on consignment" or "on memorandum." However, this subsection is not applicable if the person making delivery:

Frankie J. Warner purchased the vehicle from Capitol Corvette. He was aware that Capitol Corvette was selling the vehicle on consignment; however, there is no evidence that he should have suspected that Capitol Corvette did not intend to use the proceeds of this sale to pay the consignor or the sale was fraudulent in any manner. Mr. Warner has the burden to prove that he is a buyer in the ordinary course of business. The phrase "buyer in the ordinary course of business" is defined at sec. 402.201(9), Stats. Sec. 401.201(9), Stats., provides in relevant part that: "Buyer in ordinary course of business" means a person who in good faith and without knowledge that the sale to the person is in violation of the ownership rights or security interest of a 3rd party in the goods buys in ordinary course from a person in the business of selling goods of that kind . . . ' The parties stipulated that Frank Warner was a buyer in the ordinary course of business. The evidence in the record also supports this finding.

Although, Mr. Warner knew the subject vehicle was being sold on consignment by Capitol Corvette, he was expressly directed by James Lien to deal with Capitol Corvette. Therefore, it was reasonable for him to assume that Capitol Corvette had the authority to sell the subject vehicle and transfer ownership interest in it. The record contains no evidence that Frankie Warner had knowledge, or should have had knowledge, that the sale was in violation of the ownership rights of James Lien. Frankie Warner purchased the vehicle from Capitol Corvette, a licensed motor vehicle dealer, which at the time of the purchase was a company in the business of selling used motor vehicle.

Finally, James Lien asks that if the Department is ordered to issue a title and registration to Frankie Warner for the subject vehicle, James Lien should be given a security interest in the vehicle. "An administrative agency has only those powers which are expressly conferred or can be fairly implied from the statutes under which it operates." Oneida County v. Converse, 180 Wis.2d 120, 125, 508 N.W.2d 416, 418 (1993). The Division of Hearings and Appeals does not have the authority to create a security interest. Even if the Division had such authority, it would not be appropriate to create such a security interest in the instant matter. Frankie Warner paid Capitol Corvette the amount agreed to in the purchase contract. David Larson failed to pay James Lien for the vehicle. The question is whether Frankie Warner or James Lien should bear the loss resulting from David Larson's failure to pay for the vehicle.

The Wisconsin Supreme Court has stated that "... either the original seller or the ultimate buyer must suffer loss because of fraud. In all transactions of this type a seller takes the more obvious risks, and has better methods available for reducing or avoiding them than the ultimate

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- (a) Complies with an applicable law providing for a consignor's interest or the like to be evidenced by a sign, or
  - (b) Establishes that the person conducting the business is generally known by that person's creditors to be substantially engaged in selling the goods of others, or
  - (c) Complies with the filing provisions of Ch 409.

buyer. Between them, we think it just that the loss should fall on the seller." Hudiburg Chevrolet v. Ponce, 17 Wis.2d 281, 116 N.W.2d 252 (1962).

Conclusions of Law

The Administrator concludes:

1. Pursuant to sec. 402.403(2), Stats., Capitol Corvette had the power to transfer all of James A. Lien's ownership rights in the subject motor vehicle to a buyer in the ordinary course of business.
2. Frankie J. Warner is a buyer in the ordinary course of business of the subject motor vehicle. Pursuant to sec. 402.403, Stats., Frankie J. Warner has acquired title and ownership of the subject motor vehicle.
3. Pursuant to secs. 346.26 and 227.43(1)(bg), Stats., the Division of Hearings and Appeals has the authority to issue the following order.

Order

The Administrator orders:

The Division of Motor Vehicles of the Department of Transportation shall issue a motor vehicle title and registration to Frankie J. Warner for the 1968 Chevrolet Camaro, VIN 124378N423509, which is the subject of this matter.

Dated at Madison, Wisconsin on June 30, 1997.

STATE OF WISCONSIN  
DIVISION OF HEARINGS AND APPEALS  
5005 University Avenue, Suite 201  
Madison, Wisconsin 53705  
Telephone: (608) 266-7709  
FAX: (608) 267-2744

By: 

David H. Schwarz  
Administrator